

December 20, 2001

VIA ELECTRONIC FILING

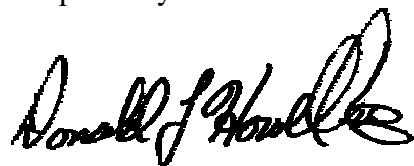
David P. Boergers, Secretary
Federal Energy Regulatory Commission
888 First Street, NE
Washington, DC 20426

RE: FERC Docket No. RM01-10-000

Dear Secretary:

Enclosed for filing with the Commission is an electronic original of the Idaho Public Utilities Commission's Comments in the above referenced matter.

Respectfully submitted

A handwritten signature in black ink, appearing to read "Donald L. Howell, II". The signature is stylized with a large, looping initial "D" and a long, sweeping horizontal stroke at the end.

Donald L. Howell, II
Deputy Attorney General

Enclosure

cc: Service List

bls/L:Boergers_dh_RM01-10-000

**UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION**

**STANDARDS OF CONDUCT FOR
TRANSMISSION PROVIDERS**

DOCKET NO. RM01-10-000

**COMMENTS OF THE
IDAHO PUBLIC UTILITIES COMMISSION
OPPOSING SEPARATION OF TRANSMISSION FUNCTIONS FROM BUNDLED
RETAIL SALE OF ELECTRICITY**

I. INTRODUCTION AND SUMMARY

On October 5, 2001, the Federal Energy Regulatory Commission (Commission) published its *Notice of Proposed Rulemaking Standards of Conduct from Transmission Providers* (“NOPR”) in the Federal Register, 66 Fed.Reg. 50,919 (Oct. 5, 2001). The Idaho Public Utilities Commission (“IPUC”) provides the following comments on this issue. The IPUC supports the goal of reducing anti-competitive behavior of energy affiliates. However, the IPUC strongly urges the Commission not to extend the standards of conduct to require separation of the transmission function from the bundled retail sales function of vertically integrated, retail electric utilities. Many states, including Idaho have not moved to electric retail competition. As written, the proposed rule is overly broad and interferes with the IPUC’s ability to regulate retail service.

II. NAME AND IDENTITY OF COMMENTER

The Idaho Public Utilities Commission (IPUC) is the state regulatory agency having sole jurisdiction to regulate the retail rates, services, and practices of investor-owned electric utilities within the State of Idaho. In this capacity, the IPUC regulates the retail electric services and rates of Idaho Power Company, Avista Corporation, and PacifiCorp.

All correspondence, communications, and pleadings in this proceeding should be sent to each of the following:

Lou Ann Westerfield
Policy Strategist
Idaho Public Utilities Commission
472 W. Washington St. (83702)
PO Box 83720
Boise, ID 83720-0074
E-mail: lwester@puc.state.id.us

Donald L. Howell, II
Deputy Attorney General
Idaho Public Utilities Commission
472 W. Washington St. (83702)
PO Box 83720
Boise, ID 83720-0074
E-mail: dhowell@puc.state.id.us

III. COMMENTS ON THE PROPOSED RULEMAKING

The Notice recites that the Commission's intent in this Rulemaking is to establish new codes of conduct to apply uniformly to natural gas and electric utilities in 18 CFR Part 161 (2001) and 18 CFR § 37.4 (2001), respectively. The Commission stated:

In light of the changing structure of the energy industry, the Commission is proposing to adopt one set of standards of conduct to govern the relationship between regulated transmission providers and all their energy affiliates, broadening the definition of an affiliate covered by the standards of conduct, from the more narrow definition in the existing regulations.

66 Fed.Reg. at 50,920.

The Commission indicates that it “is proposing to apply the standards of conduct to require a separation of the transmission function from all sales functions, including bundled retail sales and restriction on preferential access to transmission information for the bundled retail sales function.” *Id.* at 50,922 (emphasis added). The Commission specifically invites and strongly urges state commissions to provide their views on this proposal.

The Commission first established codes of conduct for electric transmission providers in Order No. 889.¹ Order No. 889 specifically exempted from the codes of conduct employees

¹ *Open Access Same-Time Information System (formerly Real-Time Information Networks) and Standards of Conduct* 61 Fed.Reg. 21,737 (May 10, 1996), FERC Stats. & Regs., Regulations Preambles 1991-1996, ¶ 31,035 (April 26, 1996).

that engage in sales or purchases solely on behalf of bundled retail load. The Commission found that purchases of power made on behalf of retail native load customers were not sales for resale.²

In this NOPR, the Commission proposes to include bundled retail sales in the sales functions that must be separated from transmission functions. The Commission proposes to require “a separation of the transmission from all sales functions, including bundled retail sales and a restriction on preferential access to transmission information for the bundled retail sales function.” NOPR at 50,922 (emphasis added). Fully regulated, vertically integrated electric company employees are to be treated the same as wholesale merchant employees. In essence, the Commission would require that transmission providers separate all employees involved with bundled retail sales from those employees managing the transmission for bundled services.

The IPUC submits that the Commission’s conclusion in Order No. 889 that purchases on behalf of bundled retail loads should be exempt from code of conduct standards is still correct today. While it is true that some aspects of the wholesale electricity industry have changed since 1996, it is still the fundamental responsibility of utilities in Idaho to provide reliable and cost-effective, fully bundled retail sales to native load customers.

Fully regulated, vertically integrated electric companies generate electricity at facilities paid for by native load customers, deliver the electricity over transmission lines built for and paid for by native load customers and provide load balancing, reliability and price stability. These activities are accomplished by employees that interact with the generation, transmission and distribution functions. This employee interaction provides economies of scale and immediate response to changing situations. This interaction is central to the operation of fully integrated electric utilities that are regulated by the IPUC and other state commissions.

² Order 889-A at 30,558-560, Order on Reh’g, 62 Fed.Reg. 12,484 (March 14, 1997), FERC Stats. & Regs., Regulations Preambles 1996-2000 ¶ 31,049 (March 4, 1997).

Gas distribution companies are not the same as fully regulated, vertically integrated electric companies. Even the Commission notes that, “One significant difference from the gas standards of conduct is that the electric standards of conduct do not prohibit transmission providers from assigning the responsibility for making purchases to serve bundled retail customers to the transmission operations and reliability function.” NOPR at 50,921. The IPUC believes this difference supports the reasonable distinction between the gas and electric industries based upon the function of the commodity being delivered, and the structure of the industries.

There are five reasons why the Commission should not impose on transmission providers a requirement to separate employees managing bundled retail sales from those employees managing the transmission necessary to accomplish that bundled service.

1. The proposed regulation extends Commission regulation into retail service matters preserved for the states by the Federal Power Act.
2. The proposed regulation requiring functional separation would serve no useful purpose. Bundled retail sales are not competitive and are fully regulated by the IPUC. The transmission used for bundled sales is a necessary component of those sales and is not available for any other use.
3. Requiring such functional separation would duplicate staff and increase costs to native load customers without a meaningful purpose or effect.
4. The proposed regulation requiring functional separation would jeopardize transmission reliability. The transmission system for a fully regulated, vertically integrated electric company was built to serve native load and was not built to serve a market.
5. The proposed regulation requiring functional separation would interfere with the primary responsibility of retail utilities to optimize existing and planned generation and transmission to provide least-cost retail service.

1. The proposed regulation extends Commission regulation into retail service matters preserved for the states by the Federal Power Act.

The Commission has consistently stated that it does not assert jurisdiction over transmission service for bundled retail sales. In Order 888-A the Commission noted that "...a transmission provider does not have to 'take service' under its own tariff for the transmission of power that is purchased on behalf of bundled retail customers."³ The Commission correctly recognized in Order 889 that power purchased and transmitted by utilities to serve native load retail customers does not constitute sales for resale. Consequently, service to native load retail customers does not fall within the Commission's jurisdiction. 16 U.S.C. § 824(a) (the Commission's jurisdiction extends "only to those matters, which are not subject to regulation by the states.")).

In its Notice the Commission states "the Commission is not proposing to assert jurisdiction over the underlying transactions in a bundled retail sale," NOPR at 59,922. While the Commission is not *asserting* jurisdiction over bundled retail sales, it appears as if the Commission is de facto *practicing* jurisdiction over bundled retail sales. Accordingly, the NOPR states:

this would ensure that all transmission customers, affiliated or non-affiliated, *bundled or unbundled*, will have equal access to the transmission providers' transmission information.

NOPR at 59,922 (emphasis added).

By virtue of requiring functional separation and restricting access to transmission information for the bundled retail sales function, the proposed separation standards do just what

³ *Promoting Wholesale Competition Through Open Access Non-discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities*, Order No. 888-A, FERC Stats. & Regs. & 31,048 at 30,216-217, *clarified*, 79 FERC & 61,182 (1997), *on reh'g*, Order No. 888-C, 82 FERC 61,046 (1998), *aff'd sub nom. Transmission Access Policy Study Group v. FERC*, 225 F. 3d 667 (D.C. Cir. 2000), *cert. Granted in part and denied in part*, 69 U.S.L.W. 3574 (U.S., Feb. 26, 2001).

the Commission indicates it proposes not to do; extend Commission regulation into retail service matters preserved for state regulation under the Federal Power Act. Bundled retail sales service requires the utility to manage its generation resources and its owned transmission capacity. It does so under the full regulatory purview of the state. Apart from a specific state-federal compact, transmission services related to bundled retail sales are either under state jurisdiction or federal jurisdiction. As illustrated above, the “mere” separation of certain employees engaged in bundled retail sales functions from the transmission function hinders the integrated generation and transmission utility from providing the most cost-effective, reliable service to its native load customers.

It is appropriate for the Commission to require codes of conduct to separate the bundled retail sales functions from those functions properly within its jurisdiction: 1) sales of wholesale power for resale; and 2) the use of transmission facilities by the utility or other parties to transmit power for resale. However, there is nothing in the transmission component of bundled retail sales of power that is not jurisdictional to state regulation and, therefore, nothing that falls within the Commission’s proper jurisdiction to impose standards of conduct and separation regulations.

Further, because bundled retail sales are not competitive, it is difficult to imagine how their provision might prejudice the use of the transmission system. If the Commission contemplates in the proposed standards of conduct that retail bundled sales must vie for the use of the interconnected transmission system, along with other wholesale competitors, then the Commission is ignoring the non-competitive nature of bundled retail sales by putting them on the same footing as competitive sales. The decision to unbundle sales at the retail level is solely a

state matter and cannot be mandated by administrative fiat. The Commission should honor its recent assertion:

When an incumbent utility operates as a traditional monopoly utility and sells generation, transmission, and distribution to the consumer in a bundled package, however, the State will continue to regulate that bundled retail service.⁴

2. The proposed regulation requiring functional separation would serve no useful purpose.

We understand the Commission's purpose in promulgating standards of conduct to be the protection of competition:

Both gas and electric standards of conduct rely on similar principles to prevent market power over transmission from being used in competitive commodity markets by: (1) separating employees engaged in transmission services from those engaged in commodity marketing services, i.e. marketing or sales of natural gas or electric energy; and (2) ensuring that all transmission customers, affiliated and non-affiliated, are treated on a non-discriminatory basis.

NOPR at 50,920 (emphasis added).

Electric utilities in Idaho make bundled sales to retail customers to fulfill their service obligations under Idaho law. *Idaho Code* §§ 61-104, 61-118, 61-119, 61-129, 61-302. These sales are supported by generation assets owned by the utility, as well as transmission facilities owned by the utility and necessary to move power from utility owned or contracted generation to native load retail customers. Bundled retail sales *are not* competitive; they are made at rates and terms established by the IPUC. *Idaho Code* §§ 61-502, 61-503. The electric plant, including transmission facilities, necessary to make these bundled sales is property dedicated to public service in Idaho and is evaluated by the IPUC when it establishes fair, just, reasonable and sufficient rates for native load retail service.

The power component of retail service is not competitive and the Commission does not have the authority to make it so by ordering the use of transmission capacity to serve ultimate customers. 16 U.S.C. § 824k(h). Moreover, the transmission function is a necessary component of bundled sales and only available for other commercial use if it is surplus to the needs of native load retail service. The Commission does not have the authority to order transmission capacity necessary for a utility to serve its own customers to be made available to some other party for some other purpose. 16 U.S.C. § 824j(d)(1)(B).

Therefore, separating the function of transmission and the employees engaged therein from the function and employees engaged in fulfilling retail sales obligations does nothing to transmission available for service under Open Access Transmission Tariffs (OATT). Separation would only serve to complicate administratively and operationally the job of the utility to meet native load obligations.

3. Requiring such functional separation would duplicate staff and increase costs for no meaningful purpose or effect.

Certain employees involved in sales and marketing of bundled service to native load retail customers must have the ability to communicate with transmission planning and operations personnel for the integrated utility to provide cost-effective, reliable, bundled retail service to existing and new native load customers. These employees *do not* engage directly in resource planning, operations, and transmission procurement associated with wholesale merchant sales. Although they are not involved in the sale for resale of electric energy in interstate commerce, these employees might be categorized as those “that engage in bundled retail sales.” As advocates for native load customers and under Idaho’s mandate to serve, they must have

⁴ Brief for the Federal Energy Regulatory Commission, at 22 (filed May 31, 2001), *State of New York, et al. v. FERC*, 225 F. 3d 667 (D.C. Cir. 2000), *cert. granted in part and denied in part*, 69 U.S.L.W. 3574 (U.S., Feb. 26, 2001), *pending* U.S. Supreme Court, Docket Nos. 00-568, and 00-809.

unfettered access to transmission planning and operations personnel in order to effectively obtain answers to questions such as:

- what if a new customer with a 50MW load was developed in this spot; can the system accommodate it?
- can the system handle an existing customer's new process load?
- what can the utility do to increase the transmission service reliability to this customer?
- will the utility be able to reliably serve a new residential and retail development being planned in the area?

If bundled retail sales activities were functionally separated from the transmission function, this could require duplication in the transmission planning staff and require additional resources, all in an attempt to be responsive to native load customer needs. This would result in increased costs to the utility, and its bundled retail ratepayers. Fundamentally, however, bundled retail sales personnel need access to transmission planning and operations personnel in order to meet the needs of bundled retail native load customers. Additionally, it is unclear whether some personnel who currently support both distribution and transmission function (T&D design engineers, system protection engineers, system operators, etc.) will be affected by this proposal. Any such effect will require additional staff and resource duplication resulting in significantly greater costs. It is apparent that the application of the standards of conduct to require separation of transmission and bundled retail sales functions will increase administrative costs while providing no measurable benefit to mitigating market power in competitive markets.

4. The proposed regulation requiring functional separation would jeopardize transmission reliability. The transmission system for a fully regulated, vertically integrated electric company was built to serve native load and was not built to serve a market.

The transmission system was built to serve the native load requirements including anticipated growth, reserved capacity for hydro operations, and load peaking periods. Even now during Idaho's peak summer requirements, the west-to-east transmission system may be constrained with just the demands of the native load customers. Therefore, it becomes necessary to have the ability to constantly monitor and exchange information to insure the reliability of the transmission capability for the native load retail customer. Without the constant monitoring of generation, purchases and transmission, the fully regulated and vertically integrated electric company could not insure reliability. The inability to effectively communicate changing native load requirements and generation levels will only serve to decrease transmission efficiency and reduce reliability.

Idaho respectfully requests that the Commission consider a standard of conduct comparable to codes of conduct currently established by the Commission. The Commission notes that it "imposes codes of conduct for power sales to govern the relationship between an investor-owned public utility and its power marketing affiliates" and "the purpose of the codes of conduct is to protect captive ratepayers of investor-owned public utilities." NOPR at 50,925. In determining the application and scope of the standards of conduct, the Commission must first consider whether such application or scope protects, and does not harm, captive ratepayers.

5. The proposed regulation requiring functional separation would interfere with the primary responsibility of retail utilities to optimize existing and planned generation and transmission to provide least-cost retail service.

Fulfilling native load service obligations is the primary responsibility of utilities in Idaho. This is the principal task to which transmission owned by the three Idaho utilities is dedicated. The full cost, including both plant investment and related operation and maintenance expenses, is recovered by the utility in retail rates. Open Access Transmission Tariff (OATT)

service generates revenue that is credited back to retail customers. Data for investor-owned utilities in Idaho showed that approximately 72% to 96% of the energy flowing over utility-owned transmission was transmitted to accomplish bundled retail sales to native load. See Exhibit A attached. OATT volumes are incidental to the utilities' primary obligation to serve retail native load. The proposed rule would turn the retail OATT relationship on its head and make the retail native load service an incidental affiliate to OATT service.

Subordinating the retail function to the OATT function would inappropriately restructure the fundamental components of retail native load service. In order to minimize cost and ensure service reliability, utilities need to optimize the full range of available generation, contract, demand-side, and transmission resources. Least-cost dispatch of the utilities' existing resources and planning of new resources require knowledge of, and unfettered access to, all of these resource components, including utility-owned, and ratepayer supported transmission. The separation proposed in the NOPR would interfere with and likely preclude utilities from providing least-cost service to native load retail customers with existing and planned utility-owned resources – resources that those customers have funded and will continue to fund in the future.

IV. CONCLUSION AND SPECIFIC RECOMMENDATIONS ON THE PROPOSED RULE

For the foregoing reasons, the IPUC respectfully submits that the Commission should *not* adopt the rule as proposed to treat transmission-provider employees engaged in bundled sales functions for retail native load the same as wholesale merchant function employees. The Commission should *not* adopt the rule as proposed to apply the standards of conduct requiring a separation of the transmission function from bundled retail sales, and a restriction on preferential

access to transmission information for the bundled retail sales function. The proposed rules, therefore, should be modified as follows:

1.3 **Definitions**

(e) Marketing sales or brokering means a sale for resale of natural gas or electric energy in interstate commerce. Sales and marketing employee or unit includes (1) any pipelines sales operating unit, to the extent provided in 284.286 of this chapter, and (2) and electric transmission provider's sales unit, including those employees that engage in wholesale merchant sales ~~or bundled retail sales~~. Sales and marketing employee or unit does not include any employee or unit engaged in managing bundled retail sales to native load customers.

RESPECTFULLY SUBMITTED this 20th of December 2001.

For the Idaho Public Utilities Commission

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Donald L. Howell, II
Deputy Attorney General

472 W. Washington Street
Boise, ID 83702
(208) 334-0312

N:FERC_RM01-10-000

EXHIBIT A

	Idaho Power Company Calendar 2000 MWH	Avista Corporation Calendar 2000 MWH	Pacificorp Calendar 2000 MWH
OATT Volume	645,597	3,160,899	13,553,792 ⁵
Bundled Retail Sales ⁶	14,598,388	8,251,809	48,300,474
Total Transmission Bundled Retail Sales As Percent of Total Transmission	15,243,985 95.8%	11,412,708 72.3%	61,854,266 78.1%

⁵ Source: FERC Form 1, page 329

⁶ Source: FERC Form 1, page 304

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 20th day of December 2001, served the foregoing **Comments of the Idaho Public Utilities Commission**, in FERC Docket No. RM01-10-000, by mailing a copy thereof, postage prepaid, to the following:

William S. Scherman
Skadden, Arps, Slate, Meagher & Flom, LLP
1440 New York Ave. NW
Washington, DC 20005-2111

Gary A. Dahlke
Paine, Hamblen, Coffin, Brooke & Miller
717 W. Sprague Ave., Suite 1200
Spokane, WA 99201-3919

Adelia S. Borrasca
Heller, Ehrman, White & McAuliffe, LLP
1666 K Street NW, Suite 300
Washington, DC 20006

Sara D. Schotland Esq.
Cleary, Gottlieb, Steen & Hamilton
2000 Pennsylvania Ave. NW, Suite 9000
Washington, DC 20006-1812

John A. Anderson, Executive Director
Electricity Consumers Resource Council
1333 H Street NW, West Tower, Suite 800
Washington, DC 20005

Randy Rismiller, Director
Illinois Commerce Commission
527 E. Capitol Ave.
Springfield, IL 62701-1827

Sarah A. Naumer Esq.
Illinois Commerce Commission
160 N. LaSalle St., Suite C800
Chicago, IL 60601-3113

/s/ Brenda Sorrell
Secretary

